Supreme Court of the United States.

October Term, 1873.

No. 131.

J. M. HENSHAW et al., Plaintiffs in Error,

vs.

GEORGE R. BISSELL.

BRIEF FOR PLAINTIFFS IN ERROR.

M'GILL & WITHEROW, PRINTERS, WASHINGTON, D. C.

Supreme Court of the United States.

OCTOBER TERM, 1873.

J. M. HENSHAW, *et al.*, Plaintiffs in Error,
v.
GEORGE R. BISSELL. } No. 131.

ERRORS.

We make no special assignment of errors, because the argument herewith submitted sufficiently points them out.

We claim that the judgment should have been for plaintiffs in error; and the Circuit Court erred in not so holding, because,

1st. The patent of the United States first issuing to them gave them paramount title, at law and in equity, to the land in controversy.

2d. The proceedings of the District Court in the case of Larkin, *after* the order dismissing the case, and remitting it, and the parties, to the Board of Land Commissioners for final action, to wit, on the 9th of February, 1857, were void and inoperative, and do not amount to an estoppel against plaintiffs in error.

3d. The statute of limitations of California, which was plead by plaintiffs in error, is a complete bar to this action, and should have been so found by the Circuit Court.

4th. On the merits of the two titles, the Circuit Court should have found that plaintiffs in error had the superior and best title to the tract of land in controversy, and judgment should have been for them.

5th. That the conduct of Larkin, the ancestor of defendant in error, with respect to the land in controversy, prior to and at the time the title to the same was confirmed in the an-

cestors of plaintiffs in error, and subsequently, were in fact and did in law amount to an estoppel of Larkin and those claiming under him.

6th. That the proceedings of the Board of Land Commissioners and of the District Court, and the officers pretending to act therein, in so far as they affect to adjudge and set apart the land in dispute to said Larkin, were void and inoperative, and did not confer title on him or those claiming under him, and did not divest plaintiffs in error of their title thereto, then already assured by judicial decree, survey, and patent.

7th. That the Boga grant was not finally, correctly, or legally assured to defendant in error, so far as the final action of the District Court is claimed to work that result, to wit, on the 26th day of June, 1865, or by force of any of the prior proceedings of said court.

8th. That said proceedings in said District Court were void for want of a proper legal party-plaintiff after the death of said Larkin, to wit, October, 1858.

There are other errors to be shown on the oral argument.

Supreme Court of the United States.

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This is an action of ejectment, brought by Bissell, defendant in error, against the plaintiffs in error, to recover a league of land on Feather river, California.

Bissell claims through a Mexican grant, made to Charles William Flugge, on the 21st February, 1844, and confirmed by the departmental assembly on the 13th day of June, 1845.

The tract said to be embraced in the grant is called Boga, containing ~~four~~ five (5) square leagues, situate in the county of Butte, State of California.

On the 24th of March, 1852, one Thomas O. Larkin filed his petition with and before the land commissioners, under the act of Congress to settle private land claims in California, passed March 3, 1851, in which he claimed a confirmation of his title to the "Boga" tract. On the 1st day of May, 1852, and prior to the confirmation by the board of land commissioners, that board ordered a preliminary survey to be made by the United States surveyor general for California of the "Boga" rancho.

On the 15th December, 1852, said surveyor general returned to, and filed with, said board of land commissioners his survey of said tract, (which is represented on the plat marked 1st, in red figures and colored light brown;) but this survey does not embrace the land in dispute.

Said board, on the 17th July, 1855, pronounced a decree confirming said claim of said Larkin. From this decree the United States appealed to the district court of the United States, and on the 24th December, 1856, the Attorney General of the United States gave notice that the appeal would not be further prosecuted, and thereupon the United States district attorney filed a stipulation, signed by both parties, for the dismissal of said appeal, and the United States district court, on the 9th February, 1857, dismissed said appeal, and ordered that said claimant have "leave to proceed, under the decree of said land commis-"sioners, as under a final decree."

On the 26th March, 1858, the surveyor general of California approved a survey of said grant called "Boga," which had been made under his direction and supervision, in accordance with said decree of said land commissioners so as aforesaid confirmed by said United States district court, which survey was also confirmed and approved by said board. It is represented on map No. 1, and marked 3d, in green figures, the boundaries thereof being shaded green. This does not include the land in controversy.

This survey was transmitted to Thomas O. Larkin, duly certified and approved, and also to the Commissioner of the General Land Office, at Washington, who set the survey aside as being erroneous, and said surveyor general was directed by him to make a new survey and location in accordance with said Commissioner's instructions and his construction of said final decree. Thereupon, without any other authority than that of said Commissioner, said surveyor general made a new survey, *in accordance with said decision and instructions of said Commissioner*, and approved the same; which survey is represented on said map No. 1, and marked "4th," in blue figures, the boundaries of said survey being shaded blue. It does not embrace the land in dispute.

Afterwards, the United States district attorney suggested to the district court by petition that said last-mentioned survey was erroneous: whereupon an order of court was

served upon the surveyor general, and he returns said survey into court. Said district attorney filed exceptions to said survey. On the 27th of August, 1860, said court issued a monition in said case, ordering the marshal to notify all persons interested in such survey and location to appear before said district court on the 3d day of October, 1860, to intervene for the protection of any such interest. Which said order was duly returned on the 3d October, 1860, with the following indorsement, viz:

"The within monition was received by me on Monday, "the 27th day of August, 1860, and in obedience thereto "I have given due notice, as therein commanded, by caus- "ing the publication of said notice for consecutive "Wednesdays in the San Francisco Herald, commencing "on the 29th day of August, 1860; and for 4 consecutive "Saturdays in the Butte Democrat, a paper published "nearest the land, commencing on the 1st day of Decem- "ber, 1860."

The court finds that said monition was in fact published on Wednesday of each week, for four consecutive weeks, in the San Francisco Herald, commencing on August 29, 1860. (Record, p. 17.)

On the 3d October, 1860, proclamation was made; the United States and claimant appearing, and no other parties appearing, default was entered as to all parties not appearing.

On the 4th December, 1861, an order was made by said court, directing that said survey, approved October 4, 1859, be set aside, and a new survey made.

On the 4th December, 1861, the United States district attorney filed a petition for rehearing upon the order last aforesaid, and on the 26th February, 1862, the court ordered the case opened for further testimony on behalf of the United States, and for rebutting testimony on behalf of the claimant. After taking further testimony, the court "ordered that the decision of March 16, 1861, be affirmed." There was no advertisement or other notice of this petition for a rehearing or for taking further testimony.

On the 15th November, 1862, said court entered an order that the survey shown by the plat filed December 7, 1859, be set aside as erroneous; that the surveyor general correct and reform said survey and location, and return a plat showing the same, in conformity with this order, to said court, for its approval. And that the same be corrected and reformed as follows:

"The southern line to be run as indicated on the diséno "in the expediente, marked '7 S. D. K.,' and authenticated "by the signature and rubric of Michetta by the natural "objects thereon represented; and thence northwardly "along Feather river five leagues, the width of said tract "lying along said river to be one league, making five "square leagues, and no more."

Accordingly a new survey was made, following this order, and returned into court on the 9th day of February, 1863, and on the 15th day of January, 1863, said court entered a decree confirming said survey. Said plat and survey so confirmed are represented upon the plat No. 1, and marked "5th," in red figures, and the land within said survey is colored red, and embraces the land in controversy, and is indicated on said map by the words "one league." Said decree confirming said survey was taken to the Supreme Court of the United States on appeal, and was dismissed at the December term, 1864. The district court, on June 26, 1865, confirmed said survey, &c. Neither the plaintiffs in error nor any of the claimants under the grant to Fernandez, hereinafter mentioned, appeared in any of said proceedings in the said district court relating to the said location of said "Boga" grant.

On the 5th day of October, 1865, a patent from the United States Government, in the usual form, was issued to Thomas O. Larkin, his heirs and assigns, for the land covered by and embraced in the last survey and plat. This patent and the proceedings immediately hereinbefore set forth, it is claimed by defendant in error, cast the title to three fourths ($\frac{3}{4}$) of said land, in said patent described,

on said Larkin and his heirs and assigns, as well as by virtue of said Mexican grant. The plaintiffs in error are in possession of the tract of land described in the complaint.

THE CASE OF PLAINTIFFS IN ERROR.

On the 19th day of March, 1852, Dionisio Fernandez, Maximo Fernandez, Josiah Beeden, and William B. Basham, as claimants, filed their petition, under said act of Congress of 1851, with the said board of land commissioners, in which they claimed a confirmation of their title to a tract containing four (4) square leagues of land, situate in the said county of Butte, and State of California, said claim being founded on a Mexican grant made by Pio Pico, Governor of California, to Maximo and Dionisio Fernandez, on the 12th day of June, 1846. (See Record, pp. 30, 31, and 32, for copies of the grant and accompanying papers, as translated.)

Said claim was confirmed by the decree of the land commissioners for four (4) square leagues of land on the 17th day of July, 1855, from which decree an appeal was taken to the United States district court, which court confirmed the decree on the 2d day of March, 1857, "in all things." And the Attorney General of the United States having given notice that he would not further prosecute an appeal from said decree, said district court, on the 9th day of March, 1857, entered a further decree, giving claimants leave to proceed under the decree of said court theretofore ordered "as under a final decree," and thereby said decree of confirmation became final.

The surveyor general of California thereupon proceeded to survey and locate, and did actually survey and locate, said four (4) leagues of land so confirmed to said claimants. That on the 29th day of May, 1857, he approved a plat of said survey and location so made, and transmitted a duly-certified copy to the General Land Office at Washington; and the same having been approved by the Commissioner of the General Land Office, a patent of the United States, in the usual form, was duly issued to said claimants,

dated 14th day of October, 1857, in accordance with said final survey and location. It is represented on Plat No. 1, and is the same included in the lines shaded yellow on said plat, and thereon designated "2d," in yellow figures. Said patent recited the presentation of said claim to the board of land commissioners and all the subsequent steps hereinbefore referred to, which ultimated in the issuance of the patent. It grants and conveys the land described in said survey and plat, and also contains the reservation prescribed by the 15th section of the act of 1851.

The land in controversy is included in and covered by said patent, being the south league of that described in and covered by the patent, and is the same land embraced in Larkin's patent, being the north league thereof. Said league is embraced in and covered by both patents.

Plaintiffs in error acquired the title to the respective parts of said land described in their respective answers under the Fernandez grant and the proceedings for confirmation and the patent of the United States issued thereunder.

Plaintiffs in error acquired their title from said grantors to the respective portions of said land, described in the respective answers, in the year 1852, and ever since the said year 1852, and since the date of said patent till the commencement of this action, they have respectively been in the open, continuous, exclusive, and adverse possession thereof, claiming title under said Mexican grant, said proceedings for confirmation, and said patent from the United States.

Said Larkin died in October, 1858. Said "Boga" rancho, as described in said original grant, was distributed to the heirs of said Larkin, by a decree of the proper probate court, on the 5th day of April, 1864, and prior to the conveyance to defendant in error.

Larkin claimed that his grant called "Boga" should be surveyed and located as the same was surveyed and located by the said preliminary survey, made under the order of the said board of land commissioners by S. D. King,

United States surveyor general for California, as the same is designated on the map or Plat No. 1, and as the same was subsequently surveyed and located by J. W. Mandeville United States surveyor general, and approved by him March 26, 1858, as the same is represented on the Map No. 1 as aforesaid. And said Larkin, down to the time of his death, insisted upon said location as being the only true and correct location. Said Larkin, at the time of the presentation of his petition, and afterwards, had knowledge of the said grant to Fernandez, and of the presentation of the said grant to the board of land commissioners for confirmation, and was one of the witnesses examined on behalf of said claimants in said proceedings for confirmation.

After said preliminary survey of said "Boga" grant, said Larkin claimed and asserted ownership to the land covered by said survey; and in the month of April, 1857, said Larkin sold and conveyed to Messrs. Sparks & Smith about six hundred acres of said land embraced in said survey; and he represented to said purchasers that his said "Boga" rancho laid entirely north of the north line of the said lands so granted to the said Fernandez, as the same were located and patented to the said claimants under that grant.

There is no note or memorandum of or reference to said grant to Fernandez in any index or record of Spanish grants found in the archives relating to such grants that have come into the possession of the officers of the Government of the United States.

There were some genuine grants, of which there is no notice or evidence in said archives; and some of that class, besides the grant to said Fernandez, were finally confirmed by said board of land commissioners, and subsequently patented as so confirmed.

Argument.

I.

The defendant in error is estopped by the conduct of his ancestor, Larkin, at the time of the consideration of

the Fernandez claim by the board of land commissioners and the courts.

1st. By his evidence given in support of that claim.

2d. By his repeated declarations that the Boga rancho was not embraced in and did not take any of the land covered by and claimed in the petition filed by the two Fernandez, Belden, and Basham before said board of land commissioners.

3d. By his positive *act*, confirming said declaration, in selling and conveying six hundred acres to Messrs. Sparks & Smith of the tract that was preliminarily surveyed and confirmed to him, not embracing any of the land now and herein claimed by defendant in error: thus publicly proclaiming to all the world his selection of said tract, and his disclaimer of any claim to or interest in the Fernandez land so surveyed and confirmed, and finally patented to said Fernandez and others.

4th. By his act in taking possession of and occupying said tract as the Flugge grant or Boga rancho.

5th. By his positive declaration that the land he claimed under the Flugge grant should be surveyed and located, as the same was surveyed and located by said preliminary survey, made under the order of the said board of land commissioners by S. D. King, United States surveyor gengeral, as the same is designated on Plat No. 1, and as the same was subsequently surveyed and located by J. W. Mandeville, United States surveyor general, and approved by him March 26, 1858.

6th. By said Larkin's continuous, uniform, and persistent claim, down to the time of his death, of said last-named survey and location, as embracing the only true and valid land to which he was entitled under and by virtue of the Flugge grant.

II.

The proceedings before the board of land commissioners and those before the district court of the United States do not operate as an estoppel against the plaintiffs

in error, nor yet as establishing the title of Larkin, or those claiming under him, to the land in dispute; because they were instituted and conducted to final determination without legal or sufficient notice to plaintiffs in error or their grantors.

1st. There was no personal notice to either.

2d. None of them were present or represented in the proceedings.

3d. Larkin, in his lifetime, knew that the land in dispute was claimed, held, and occupied by Fernandez and others, under the Fernandez grant; the confirmation of said board and the district court, and his grantees, are charged with the same knowledge.

4th. The constructive notice by publication was invalid, insufficient, and unconstitutional, so far as it is claimed the proceedings take away the property of the parties against whom it is said to operate. There are several objections to the validity, &c., of such notice, but it will suffice to state a few. In the first place, constructive notice by publication is only resorted to and permissible when personal notice is impossible. It is true that the act of Congress of 1860 directs that notice by publication in two newspapers shall be given, and it was given accordingly, and there was no other notice; but it is to be observed that the act does not excuse personal notice where the parties are known, and are within the jurisdiction of the court.

Here they occupied the land, (a fact well known to Larkin,) and were within reach of the process of the court, Butte county being within the northern judicial district of California. Larkin had testified in their favor before the land board when they were asking the confirmation of their title to this very land, and he was well acquainted with those proceedings and their object. He knew, therefore, that there were other claimants of this property, who they were, and where they could be found. It will not be forgotten that these proceedings were commenced and continued to their close in the name of Larkin. So that, when the final survey was made, including the league of land

covered by the patent under which plaintiffs in error claim, those who were conducting the proceedings were charged with the same knowledge of the same facts, and were bound to do what Larkin would have been bound to do were he in full being, and they were equally as accountable for all the consequences of omission as he would have been.

Where a defendant in ejectment, in a conversation before suit brought, and with the view to being made a defendant and trying the title, declared that he was in possession, and the action was thereupon brought against him: *Held*, that he was concluded, though in truth he was not in possession.

Doe *ex dem.* Mordecai's Heirs *v.* Oliver, 3 Hawks, 479.

Crockett *v.* Lush~~wood~~brook, 5 Monroe, 530–544.

The owners of an ancient mill permitted the defendants to lower the bank of the run on their land, and to make a weir above the mill, whereby less water than before flowed to it: *Held*, that both the owner and his heirs were concluded.

Liggins *v.* Ingle, 7 Bing., p. 682.

Jackson *v.* Reynolds, 1 Caine's Rep., p. 344.

Acknowledgments of defendant, confessing that he entered without title, had agreed to purchase of the lessor of the plaintiff, so soon as, &c.; and that event having occurred, he was held to the statement and admission.

Welland Canal Co. *v.* Hathaway, 8 Wend., p. 483.

Presbyterian Congregation *v.* Williams, 9 Wend., p. 147.

Davis *v.* Davis, 26 Cal., p. 23.

The law of equitable estoppels, or estoppels in fact, applies to all cases where rights once valid are lost by delay and the implied acquiescence resulting from such delay.

2 Story's Eq. Jur., secs. 1534, 1546.

In the second place, the notice is not valid, because in no view can it be made to appear that plaintiffs in error had

personal knowledge, or that the publication of the advertisement had been brought home to them, so as to have been a warning to them. These facts, viz, that Larkin had uniformly disclaimed that his "Boga" rancho covered any of the land embraced in the land confirmed and patented to Fernandez and others; that he had taken possession of the land first surveyed and confirmed to him, called the preliminary survey; and that he had sold and deeded 600 acres of it, and had testified to the validity and justness of the Fernandez claim as surveyed and patented, were enough to justify and authorize plaintiffs in error to rest quiet in the belief that there would be no attempt to locate the "Boga" rancho on their land. There is nothing in the notice which would authorize any other presumption. They had the right in law to rely upon the conduct of said Larkin, as precluding all possibility that their land, or any part of it, would be claimed by him. Any other view would enable his legal representatives and assigns to commit a fraud by the agency of the law.

Further, the notice is specific as to a *particular survey*, then made and on file in the case.

If plaintiffs in error had known of and regarded the notice, upon inspection they would have found nothing there that could affect or interest them, because the land embraced in the survey did not, nor did any of it, belong to them, neither was it claimed by them. They had, therefore, no cause to complain of that survey, and had no interest to protect. That survey was afterwards set aside, and a new survey ordered on exceptions filed by the United States. There was no further notice, by advertisement or otherwise. So that when a new survey was ordered, and one was made, embracing one league of land belonging to plaintiffs in error, no notice of that survey, or the proceedings under it, was given, whereby the owners of the Fernandez grant could be bound. The notice that was published (Record, p. 17) says: "Whereas objection has been "made to the official survey and location of the land, finally "confirmed, in case No. 358, to Thomas O. Larkin, known

"as 'Flugge Rancho' or 'Boga,' and situated in the county "of Butte, in said district: Now, therefore, you are hereby "commanded," &c., "to give due notice to all parties hav- "ing, or claiming to have, an interest in such survey and "location," &c., "to appear," &c. This certainly does not embrace and cover the proceedings which afterwards took place. They were not expected, had the notice been operative as to them, to follow up other and different surveys. The notice was as to the land embraced in that particular survey, *then on file.* We apprehend this notice was given by authority of the 1st section of the act of the 14th June, 1860, or under the second *proviso* of the 3d section of the same act. Both limit the notice to the specific survey then in hand. In the one the words "survey and plat." and in the other "survey and location," are used; but both are equally specific, and confine the notice to the particular act of the surveyor general then under discussion. The parties notified are those who have an "interest in *such* survey and "location, then and there to intervene for the protection "of *such* interest."

That survey and location having been set aside, all parties interested in it were at liberty to go hence. Certainly, not being parties to the suit, but having been notified to come there for a special purpose, they were not bound by any other surveys that might thereafter be made. All that was done on the return day of that notice, (viz, 3d October, 1860,) was to enter a general default. No further proceedings were had until the 16th day of March, 1861, (nearly five months after said return day,) when said survey was "set aside and a new survey made *in accordance with the views expressed in the opinion of the court.*" That opinion is not printed in the record, and we are not enlightened as to those views. It is not pretended that the subsequent proceedings of the court would bind any party not in the case by *actual* notice, much less those who had been previously notified by publication. What was done up to this time did not prejudice plaintiff's in error, and there was, therefore, no cause of complaint on their part. Their property

was not touched by the previous surveys, which were all set aside and no longer existed. But on the 4th December, 1861, the United States district attorney filed a petition for a rehearing of the order of the court made on the 4th October, 1859. On the 26th February, 1862, the court "ordered that the case be, and hereby is, open for further "testimony on behalf the United States and for rebutting "testimony on behalf of claimant." After taking further testimony, the court "order and adjudge that the decision "of the court of March 16th, 1861, be, and the same is "hereby, affirmed." No default is entered because there was no attempt to notify any one to appear.

It will be observed that the publication already referred to (Record, p. 17) announces that "objection has been made to the official survey," &c.; not that "testimony is to be taken to determine the validity, &c., as is ~~prescribed~~ provided in the 2d *proviso* of the 3d section of the act of June 14, 1860. The 1st section provides for one form of notice, and this section for another and distinct form of notice. The one relates to the survey and plat and their completion, and the other to the taking of testimony, &c.

It will also be observed, that no question as to the taking of testimony was involved when the publication was ordered. Nothing but the "objection to the survey," &c. Thus, it is fair to presume that that notice was not the one contemplated in the *proviso* referred to. And yet the action of the court on the 26th February, 1862, (Record, p. 18,) made another notice imperative. The language of that proviso is, "That before proceeding to take the testimony," &c., * * * * "said court shall cause notice to "be given by public advertisement, or in some other form to be prescribed by their rules," &c.

It is to be further observed, that while the court (Record, p. 18) ordered default to be entered as to all parties not appearing in answer to that notice, there is no averment that there was any notice *of any kind* in reference to the order of the 26th February, 1862, and, as a consequence, there was no notice, constructive or otherwise, of the proceedings

which ultimated in the surveying and appropriation of the league of land covered by the patent to Fernandez.

Therefore, if the published notice was valid, it was only so in reference to the survey then in hand, and did not reach and could not affect subsequent proceedings. But we submit that those proceedings, which followed the order of 26th February, are void for want of any notice whatever.

It would seem that the appeal from the land commissioners was not prosecuted further than the district court, and that it was then and there, to wit, on the 24th December, 1856, (Record, p. 14,) ordered to be dismissed, and the court remitted the claimant (Larkin) to his decree of confirmation, pronounced by said commissioners, "*as under a final decree.*" From that time the district court lost all control over the case, and their proceedings afterwards were simply void and without warrant of law.

III.

The act of Congress of the 14th June, 1860, is unconstitutional, in so far as it provides that a citizen may be deprived of his property by the judgment of a court in a proceeding to which he is not a party, and has had no legal notice of the pendency of judicial proceedings, wherein his property is condemned.

The 1st and 3d sections of this act, so far as they provide for bringing others not parties to the suit into court by advertisement alone, are in contravention of article V of Amendments to the Federal Constitution.

It permits a citizen to be deprived of his property without due "process of law." These words are construed to imply and include "*actor, reus, judex*, regular allegations, "opportunity to answer, and a trial according to some set-"tled course of judicial proceedings."

Murry's Lessee *et al. v.* Hoboken Land and Improvement Company, 18 Howard, p. 280, (opinion of court,) and other cases therein cited.

Confessedly these proceedings were *judicial*, while those in the case of Murray were not. The court was called upon to consider and judicially determine to whom should be adjudged the ownership of the land in question. Plaintiffs in error were at the time in the possession, use, and enjoyment of it, and yet they were not made parties, and were not personally notified of any of the proceedings whereby they were to be deprived of it by the judicial judgment of that very court. The land commissioners had not done so, the surveyor general had not surveyed and located the claim on their land when and up to the time the appeal was taken to the district court (Record, p. 14) and for a long time afterwards.

The spirit of the decision of the Supreme Court in the case cited from 18 Howard (*supra*) undoubtedly is, that had those proceedings therein reversed been *judicial* in their nature, the court would have set them aside for a want of power on the part of the court to have entertained them. They would have deprived the citizen of his property without "due process of law." Now, the case at bar, with deference we urge, is no less a flagrant violation of that constitutional right.

Here the court pronounces judgment against plaintiffs in error, depriving them of their property without any legal notice of the judicial proceedings, without "giving them their day in court," and "without due process of law." If the statute applied to such a case, its unconstitutionality deprives the court of the power to use it against plaintiffs in error. If the words "due process of law" include "*actor*, *reus*, *judex*, regular allegations, opportunity "to answer, and trial, according to some settled course of "judicial proceedings," then are these proceedings here, invoked to deprive plaintiffs in error of their property, utterly and completely paralysed for the want of the main elements of this ancient maxim, adopted and declared a rule of the Supreme Court.

But the statute does not apply to this case, and the proceedings of the court, after dismissing the appeal on the

24th December, 1856, were void for want of authority. There was no case pending before the court, on appeal or otherwise. The case had finally passed from that court, and beyond its jurisdiction, by the order made on the 24th December aforesaid. Hence all the subsequent proceedings in the district court were without authority of law, and that court was divested of jurisdiction to entertain or adjudicate any matter in reference to said land or the survey and location thereof.

It is true that the acting district attorney, in November, 1859, did file a petition in the district court, suggesting that another survey, which had been made *after* said appeal was dismissed, was erroneous, and the court ordered the same to be returned into court. (Record, p. 15.) Whereupon the court took proceedings thereon. That this was unwarranted by law will appear after a moment's consideration of the law. The authority of the district attorney to apply to the court at all is contained in section 9 of the act of March 3, 1851. It prescribes and limits the grounds upon which such petition shall be predicated, viz: where there has been a rejection or confirmation by the land commissioners, the same may be reviewed.

The section likewise defines what the petition shall contain, and what evidence and papers shall accompany it, and then prescribes that a copy shall be served, &c. Obviously the petition referred to by the court in its findings, on page 15, is not this one, and was not filed under this section of the law, because it does not state any of the facts nor ask the relief prescribed in this section. Instead of being in the nature of a new suit, such as is clearly contemplated by this law, it is a petition embodying a simple *suggestion*, as it were, in a suit then pending. But, there being no suit pending in that court, it failed to give the court that jurisdiction necessary to justify the order made. There must be a positive law to warrant it. There being none, however, the proceedings under it are void. We hardly think it will be seriously contended that there were any proceedings then pending in that court. It will be noticed

that the survey and location, which, as to these suggestions of the district attorney, were made in pursuance of the decree of the land commissioners, (Record, p. 14,) and not in pursuance of any order of said court, which had not considered or passed upon it in any form, except to dismiss the appeal. That was all that the court did. Thus, it being apparent that there was no suit in the district court in which any lawful proceedings could be had affecting the land of the plaintiffs in error, all that was done in that court was null and void, so far as their interests are involved.

IV.

But there is another and serious objection to these judicial proceedings. It appears (Record, p. 23) that Thomas O. Larkin departed this life in October, 1858, some years after the original proceedings were commenced, and that the record does not show that his death was suggested and his legal representatives substituted in his stead as plaintiffs.

V.

The proceedings of the Commissioner of the General Land Office, the subsequent location and proceedings of the surveyor general, and of the district court, which took place after the survey and approval of J. W. Mandeville, on the 26th March, 1858, were, as we have shown, without warrant of law and void, and the court was without jurisdiction in the premises. It cannot be fairly claimed that the case of ~~the United States~~ Castro *v.* Hendrick, (23 How., p. 440,) validates them. A careful perusal of that case shows that the Supreme Court, in United States *v.* Sepulveda, (1 Wall., p. 104,) is strictly in affirmance of it. The jurisdiction of the district court in this class of cases is essentially limited and circumscribed by the very terms of the statute. In the last-named case the court denied the power of that court to order the correction of a survey made *prior* to the passage of the act of June 14, 1860.

The survey of March 26, 1858, which was confirmed by the land board and the court, was remitted by that court

to that board, to take all needful steps to assure the title which their judgment had pronounced valid. This put an end to the jurisdiction of the district court for any further proceedings in that case. These things were all done *prior* to the passage of the act referred to. In the light of the decision of the Supreme Court in 1 Wallace, how could the district court order another survey of this land? Whence the authority to do it? We have already shown that there were no proceedings pending in the district court when the act passed, and none after the final order of the district court of February 9, 1857. (Record, p. 14.) It will not be seriously contended that there were any legal proceedings pending when the act of 1860 became a law.

We have shown how utterly groundless were the proceedings of the court on the alleged petition of the district attorney. They had no legal bottom whatever and gave the court no jurisdiction. The case, up to the action of the Commissioner of the General Land Office, is brought within the rulings of the Supreme Court in 1 Wallace. But from that time forward the proceedings are utterly void, falling, as they do, directly within those rulings.

There is, then, no valid survey or location, supported by legal proceedings, whereby it can be claimed that the lands in dispute passed to Larkin or defendant in error. Falling back upon the only valid survey and location, viz, that made and returned by S. D. King, United States surveyor general, on the 15th day of December, 1852, we find that it does not embrace the land of defendant in error. (Record, p. 14, top.)

VI.

In relation to the cases relied on by counsel for defendant in error, on the plea of the statute of limitations, I reply, that they are not analagous. In the case of Hibbard *v.* Smith both parties claimed under the same original title: in this case we claim under a confirmed grant and patent from the United States, issued more than five years before the defendant in error commenced his action. This, we con-

tend, gave us a perfect title, which could not be divested by the issuance of a subsequent patent to Larkin. This point, however, is so fully discussed in another part of this brief, that we will not dwell upon it, but proceed at once to the consideration of some other questions presented in the brief of defendant in error.

VII.

The first branch of the second proposition, "that we "(they) had a grant from the Mexican Government for "Boga," dated *February* 21, 1844," we admit; but the second, "that such grant was of the "identical" land covered by our (their) survey and patent," is emphatically denied.

The whole effect of the decree of confirmation was to determine the existence and validity of a grant to Flugge for five leagues of land, within certain exterior boundaries, but it did not *define or segregate any particular five leagues* to which the grant could attach. That could only be done by the executive authority of the government, and until it was done, the grant remained incomplete and imperfect.

Grisar *v.* McDowell, 6 Wallace, p. 373.

In the case of The United States *v.* Halleck, (1 Wallace,) the Supreme Court of the United States say, "the survey "must conform to the description in the decree of confirmation."

The description in the decree in the Larkin case is as follows: "To be located in accordance with the calls of the "grant and the boundaries delineated on the map accom- "panying the expediente to which reference is made. The "southern boundary is indicated on the map by the line "marked 39° 33′ 45″ north latitude, and the northern by "that marked 39° 48′ 45″ north latitude." It will be observed that the decree does not make the true degrees of latitude the boundary, but the line indicated on the map by those figures. These degrees of latitude are evidently laid down with reference to those delineated on the map of the Sutter or New Helvetia grant; the southern bound-

ary of the Flugge or Larkin grant being identical with the northern boundary of the Sutter grant.

The map or diseño accompanying the expediente in the Flugge case shows the "Boga," or land solicited and subsequently granted, colored in green, binding on the line marked 39° 33′ 45″ north, that being indicated with the northern boundary of the Sutter tract, and extending northerly along the west bank of Feather river 5 leagues to the line marked 39° 48′ 45″ north. This error in the degrees of latitude, as referred to in the grant and in the decree of confirmation, led to two hypotheses as to the true location of the land claimed under the Flugge grant. The first, fixing the southern boundary of the tract at the true position on the ground of the line of latitude 39° 33′ 45″ north, and extending north to the line 39° 48′ 45″, was the location always claimed and contended for by Larkin, and particularly by the preliminary survey made under his direction by Surveyor General King in 1852, and the first official survey make by Surveyor General Mandeville, and approved on the 26th of March, 1858.

This last survey was, after a long delay, rejected by the Commissioner of the General Land Office, and sent back, under instructions to make a new survey; whether rightfully or not it is not necessary here to inquire, as that question is also fully discussed in other parts of the brief.

This brings us to the second hypothesis as to the true location of the land granted and confirmed to Larkin, which was, rejecting the lines of latitude as laid down on the diseño or map as erroneous, to adopt the other parts of the description contained in the decree of confirmation. That description fixes the southern boundary of the Flugge or Larkin grant not on the line of 39° 33″ 45′ north latitude, but on the line designated by those figures on the diseño. That line is identical with the northern line of the Sutter grant, and all the evidence goes to show that such was the true boundary originally intended by the Mexican government in making the grant to Flugge. Such also seems to have been the opinion of Surveyor General Hays,

when he located the Fernandez grant in 1857. Both grants had been finally confirmed by the dismissal of the appeals in the United States district court, and both were awaiting a final location by him in order to obtain their patents. The Fernandez having first demanded a location, and both grants calling substantially to bind on the Sutter grant, (the degrees of latitude being rejected as erroneous,) he gave the preference to the Flugge grant as being the oldest. He therefore measured off five leagues from Sutter's northern boundary to satisfy the latter, and located the Fernandez entirely north of the five leagues so reserved, in order to avoid any conflict between the two.

Surveyor General Mandeville adopted the same hypothesis, after his first location was sent back by the Commissioner of the General Land Office, and located the Flugge grant on the identical lands which had been reserved for that purpose by Surveyor General Hayes, without any conflict with the previous location of the Fernandez.

From the foregoing statement we deduce the following conclusion:

That under the description in the decree of confirmation in the Flugge case there were but two possible locations of the grant: the first was, to adopt the true lines of latitude as referred to in the decree and grant, or that being rejected, to commence at the northern boundary of the Sutter grant, and extending northerly along the west bank of Feather river, five leagues in length by one in breadth, for quantity. Any other location would be inconsistent with the decree of confirmation, and would consequently be illegal and void, so far as it conflicts with the vested rights of third parties, acquired under a confirmed Mexican grant previously located and patented by the United States. We think it also establishes the proposition with which we started, to wit, that the decree of confirmation and survey *does not* determine that such grant was of the identical lands covered by our (their) survey and patent.

These conclusions are fully sustained by the Supreme

Court in the case of the United States *v.* Frémont. (17 How., p. 558.)

The doctrine there laid down is in substantial conformity to the practice of the Mexican government in California.

Nearly all the grants were made within exterior boundaries, embracing an area largely in excess of the quantity granted; this excess, usually called the *sobrante*, was in form reserved in the grant for the use of the nation; or, in other words, to be granted to other parties who might solicit lands within the same exterior limits. When grants were so made, the grantee entered into possession, taking care not to encroach upon the lands occupied by other parties.

To give full effect to such a grant, by attaching it to the quantity granted by specific metes and bounds, required an additional act of the executive department of the government: that act was known as the delivery of juridical possession, and was performed by the alcaldes or justice of the peace of the pueblo.

The mode of proceeding was by giving notice to the colindantes, or neighboring landholders, of the time and place of giving possession, and if any objection was made, it was settled by the officer on the ground: thus exercising a jurisdiction not unlike that conferred upon the United States surveyor general, in similar cases, by the act of the 3d March, 1851, establishing the United States land commission.

The question so settled, and possession given, and boundaries defined, *was conclusive, not only on the government, but upon all other parties, whether their grants were prior or subsequent to the one so segregated and defined by specific boundaries.*

The decision in the Frémont case (17 How.) was doubtless not only based on this well-settled practice under the Mexican law, but also on the plain principles of reason and justice. It simply amounts to this: that where a party has entered under a grant from the Government upon lands, and the Government has segregated the lands by metes and bounds, it cannot afterwards come in and take

back any portion of the lands so segregated, either for its own benefit, or for the benefit of a third party.

This conclusion is fully sustained by the Supreme Court of the United States in the case of the United States *v.* Armijo, and The Ordinanzas de Tierras y Aguas, therein cited, reported in 5 Wall., p. 444.

This case is simply a continuation of the case of Waterman *v.* Smith, 13 Cal., 373. It was a controversy between the same grants, to wit, the Suisun or Ritchie grant, on the one hand, and the Armijo or Talenas grant on the other. It involved substantially the same questions as those presented in the latter case, as to the prior or superior right growing out of a confirmed Mexican grant of junior date, but first surveyed, segregated, and patented by the United States, and a senior grant subsequently confirmed by the United States courts, and seeking location within the same exterior boundaries. The main question presented was whether, in making the location, the older grant could encroach upon the lands already patented to the junior grant. The court decided that it could not, the survey showing, as in this case, that there was ample land within the exterior boundaries to satisfy its calls without such encroachment.

The effect of the decision, as stated in the opinion of the court, operates not only as an affirmance of the principles settled in Waterman *v.* Smith, but is also a reaffirmance of the rules of location laid down in the Frémont case above cited, and a recognition of the modes of proceeding in such case, under Mexican law, as set forth in the Ordinanzas cited in the opinion. But, as we intimated, a contrary view would be repugnant to the principles of common sense and justice.

We will illustrate this idea by supposing a similar case between private individuals; for in these cases the Government, in its duties and responsibilities, occupies no better position than an individual.

Suppose, then, that A owns a large tract of land, and grants to B 2,000 acres, to be set apart and segregated by

metes and bounds by A at some future indefinite period. A subsequently grants to C 1,000 acres, within the same exterior boundaries, upon similar terms and conditions. Afterwards A transfers his interest to D, who succeeds to all the rights of A, including the right of defining and locating by specific boundaries the lands granted to B and C. C, the junior grantee, first applies to D to have his land set apart and segregated by metes and bounds. D accordingly goes upon the land and measures off to C his 1,000 acres, and executes to him a formal deed for the same, with a definite description of the land, leaving a sufficiency undisposed of to satisfy the grant to B. Then comes B, with his older grant for 2,000 acres, and asks to have it also segregated by metes and bounds, whereupon D goes upon the ground and locates the grant of B upon 2,000 acres, in such a manner as to include the 1,000 acres already located and deeded to C, and gives B also a new deed, with specific boundaries for the land so located. Upon this last deed B sues C in ejectment, to recover the 1,000 acres included in his deed, but which had already been conveyed by D, the successor of the common grantor, to C. Now, it is confidently asked, is there any court, either in law or equity, which would perpetrate such a monstrous act of injustice as to deprive C of his lands, held under a prior *legal* title, and confer them upon B, the holder of the junior *legal* title? Yet that is what the court is asked to do in this case.

The case supposed and the one at bar are precisely parallel. The United States, as the successor of Mexico, undertook to protect all valid Mexican grants to lands in California, and constituted certain tribunals to determine the validity of such grants. In this case those tribunals decided that there were two valid Mexican grants to be located within certain exterior boundaries on lands ceded by Mexico to the United States. The one grant was for five leagues and the other for four, making nine leagues of land, which the tribunals created by the United States had solemnly declared to be private property, and as such guarantied by the treaty of cession. The United States, then, in accord-

ance with their treaty obligations, go on and locate the four-league grant, and issue a patent for the same; but when they come to locate the five-league grant, instead of giving the five leagues as called for by the grant, they confiscate one league, and, in order to indemnify the claimant, they pretend to give him one league of the land already patented to the other United States grantee, so that by this operation the United States, instead of granting nine leagues, as they were bound to do under the treaty, to satisfy the two grants declared valid by their own tribunals, appropriated but eight leagues for that purpose, retaining for their own use the league cut off from the last-located grant.

Now, we ask whether the grantees under the Fernandez grant, who have only received what they were entitled to under the treaty and the decisions of the tribunals to which the validity of their title was submitted, guarantied by a patent from the United States, the highest sanction that could be given to their claim, can now be divested of the rights so acquired by the fraudulent action or gross mistake of the Government officials under whose sanction and authority the final location of the Larkin grant was made? We answer, they cannot. By the issuance of the patent their rights become finally vested to the land granted, and no subsequent action of the Government could divest them, except by a proceeding in equity, to set aside the patent on the ground of *fraud* or *mistake*.

VIII.

The question raised under the third point below assumed by defendant in error, as to the doctrine of relation as applicable to this case, has been met to some extent in the general views presented in the foregoing pages, and we might, *arguendo*, admit all that he claims, without affecting our prior and paramount title, as against the defendant in error in this action. Before proceeding, however, to discuss that branch of the subject, we will again call the attention of the court to the case of the United States *v.* Fedory, 3 Wallace,

in which the court decides, in distinct terms, that the patent relates back to the presentation of the claim before the United States land commission. In the case of Grisar *v.* McDowell the same principle is reaffirmed. In that case the court says: "The claim of the city took effect by relation, "as of the day when the petition of the city was presented "to the board of land commissioners." (6 Wallace, 363.) If the court had intended to carry back the relation to a period anterior to the time named in the cases above cited they would have said so, and in the case of Federy would have carried it back to the date of the grant or the commencement of proceedings before the Mexican authorities, or in the case of the city to the original organization of the pueblo, when it first became entitled to pueblo lands. Not having said so, we are bound to believe that it did not intend to go beyond the time designated in the opinions cited. They therefore stand as the rulings of the highest judicial tribunal of the country.

The claim of Fernandez, having been the first presented to the land commission, becomes, therefore, under these decisions, the prior and paramount title.

But we do not propose to rest the point raised under this head upon this view alone. Admitting, as we have said, for the sake of the argument, that the decree of confirmation relates back to the date of the original grant, what would be the effect of such relation here?

The patent gives no additional validity to the title. The decree, when it became final, settled that question definitely, and the relation back must apply to the decree. The relation back must then refer to such title as the grantee held under the Mexican government, which was in this case to five leagues of land within larger exterior limits.

The decree of confirmation would have this effect and no more. It would neither enlarge nor diminish the rights of the claimant under the grant, nor could it, *sui vigore*, attach to it any particular or definite locality. That, according to the decisions in the Frémont case, 19 Howard,

and the rulings of the Supreme Court of the United States in the Louisiana and Florida cases, as well as those from California, required a survey and location from the Government to give it final validity and attach to it a particular and definite tract. As a necessary consequence, until this was done, the title remained inchoate and imperfect. (See Waterman *v.* Smith, also Grisar *v.* McDowell, 6 Wallace, 363, where the court say, "Until the lands were thus definitely assigned and measured off, the right or claim was "an imperfect one.")

When this was done, the grant so located and segregated became, for the first time, a perfect title to the particular tract, and as such prior and paramount to all other grants which had not previously been so perfected by an official survey and location.

The case of Armijo, 5 Wall., 444, decides directly the reverse of what is claimed for it on the other side, as we have abundantly shown above. It is true there is in the opinion some vague reference to some remote equity growing out of a provisional right of occupation conceded to the grantee, Tolano, by the military commandante. Yet, in the very next case reported in the same volume, the court say: "Under the government of Spain in California the "commandante or priest had no authority to grant lands, "or to make contracts that would bind the Spanish gov- "ernment to grant them * * *. A possession under a "simple permission to occupy would not raise even an "equity against the government." (Sereno *v.* United States, 5 Wall., 460, 461.)

The same rule prevailed in California after the passage of the colonization laws of 1824 and the regulations of 1828, as has been repeatedly settled, both under the Mexican government and the decisions of the Supreme Court of the United States.

The case of Armijo was therefore decided upon the principle which we have all along contended for, "that the gov- "ernment had the right to locate a junior grant within the "exterior limits therein described, and that such location,

"when made, was conclusive against a prior grant within "the same exterior limits, which had not been previously "surveyed and located."

The case of Teschmacher *v.* Thompson, cited on the other side below, is inapplicable to the present issue. That was a contest between a confirmed Spanish grant, located and patented, and a title derived from the United States subsequent to the cession. There the doctrine of relation applies, as contended for by the defendant in error, but not as between confirmed imperfect grants derived from the Mexican government.

In the Teschmacher case the confirmation, location, and patent established the fact that the land embraced within its limits was, and had been from date of the grant, private property, as against any right acquired from the United States subsequent to the cession; besides, there was a special act of Congress reserving from pre-emption or location, under the laws of the United States, all land covered or claimed under Mexican or Spanish grants. But it does not follow that such a grant would take precedence of another Mexican grant which had been previously located and patented.

The patent to the claimants of the Fernandez grant being the elder, it is well settled, that it is paramount to the Boga grant. It is so held in Walterman *v.* Smith, 13 Cal., 373, and likewise in the following cases: Biddle Boggs *v.* The Merced Mining Co., 14 Cal., 279, 362; Luse *v.* Clark, 20 Cal., 425; Estrado *v.* Murphy, 19 Cal., 269; Minturn *v.* Brewer, 24 Cal., 644; Moore *v.* Wilkinson, 13 Cal., 484.

The Boga grant is inchoate and imperfect. It is a grant for five leagues within an area containing from ten to ten-and-a-half leagues. The Government of the United States, succeeding to the rights of the Mexican government, must come in and designate and set apart to Flugge, or those claiming under him, the five leagues granted out of this larger area. When this is done, the grant to Flugge becomes a perfect title. Until that is done, it is an imperfect title.

The same may be said of the grant to Fernandez. That was also imperfect until there was a survey and segregation of the quantity granted (four leagues) within the area of ten-and-a-half leagues, the quantity embraced in the diseño. Perfect and imperfect titles to property are known in all systems of jurisprudence. See Blackstone's Comm., Book 2, pp. 195–199, where he defines the various stages or degrees of titles to property. For the Mexican law, see Ordinaryas de Tierras y Aguas, edit. for 1855, p. 7, where the author says: "When no right to a stranger "intervenes to limit the exercise of the right of property, "it is said the property is perfect." Also, "When the ex- "ercise of the right of property is limited by a right which "belongs to another proprietor, it is said then that the "property is imperfect." See also Eschiras, Diccionaans de Legislacion, &c., title "Propriedad." In the grants above mentioned to Flugge and Fernandez, the government comes in, as another proprietor, to limit the rights of the grantees, by cutting down the quantities embraced in the map in each case to the quantities granted. Menard's Heirs *v.* Massey, 8 How., 293, where the title of plaintiff was held imperfect because there was nothing but a concession; there had been no survey, no *process verbal*, and no title in form, p. 306. (On page 314 a form of a complete Spanish title is given, which see.) When anything remains to be done by the government to attach the title or grant to the particular land, or to complete the grant, it is imperfect, as in United States *v.* Davenport, 15 How., 1, and United States *v.* Patterson, 15 How., 10, where the concessions were made by the commandant at Nacogdoches, who could only make concessions of inchoate grants; to make them perfect, the ratification of the civil and military governors was required. They did not possess this last requisite, and though they had all the rest but this, they were held imperfect. See 15 Howord, pages 8 and 12; see also Paschal *v.* Perez, 7 Texas, 376. These were held imperfect for want of a title in form. Ballance *v.*

Passin, 19 How., 343, held imperfect for *want of a survey*. In Bryan *v.* Forsyth, 19 How., 335, same title as in Ballance *v.* Passin, held perfect, and that it was perfected by a survey. See also De Arguillo *v.* Greer, 26 Cal., 628, 629. For examples of *perfect titles*, see Arredondo's case, 6 Peters, 91–94, where there was a *survey*. This grant to Arredondo is spoken of in Glenn's case, 13 How., p. 257, as "a perfect title, having every sanction the "Spanish government could confer." See further D'Auterrivi's case, 15 How., 14; United States *v.* Roselius, 15 How., 31–33; United States *v.* Ducross, 15 How., 38; United States *v.* Brooks, 10 How., 442.

The first perfect title must prevail. See Stoddard *v.* Chambers, 2 How., 317, 318; Ledoux *v.* Black, 18 How., 475; Bagnell *v.* Broderick, 13 Pet., 450, 451; Chauteau *v.* Eckhart, 2 How., 375, 376; Les Bois *v.* Bramell, 4 How., 449; Mackay *v.* Dillon, 4 How., 421; Barry *v.* Gamble, 3 How., 32; Landes *v.* Brant, 10 How., 348; Menard's Heirs *v.* Massey, 8 How., 293; Bissell *v.* Penrose, 8 How., 317; Mills *v.* Stoddard, 8 How., 345; Lefebore *v.* Cameau, 11 Lou., 203; Slack *v.* Orillion, 11 Lou., 587; Lott *v.* Prudhomme, 3 Robinson, (Lou.,) 293; Metoyer *v.* Larenandere, 6 Robinson Lou., 139; Cousin *v.* Blanc's Exrs., 19 How., 209; McCabe *v.* Worthington, 16 How., 96.

The Government of the United States could alienate the land embraced in the diseño of the Boga grant with the most perfect good faith, where a sufficient quantity was left to give to Flugge the five leagues granted to him. Said the United States Supreme Court in Frémont's case: "It "is true that if any other person within the limits, when "the quantity granted to Alvarado was to be located, had "afterwards obtained a grant from the Government by "*specific boundaries*, before Alvarado had made his survey, "the title of the latter grantee could not be impaired by "any subsequent survey of Alvarado as between the indi-"vidual claimants from the government. The title of the "party who had obtained a grant for the *specific land* would "be the *superior and better one.* For by the general grant

"to Alvarado the government did not bind itself to make "no other grant within the territory described until after "he made his survey." (See 17 How., p. 558.)

To the same effect is Ledoux *v.* Black, 18 How., 475, where the court, adopting the language of the supreme court of Louisiana, said:

"We there held, that when the boundaries of a confirm- "ed claim are vague and uncertain, and are to be fixed by "the operations of the surveying department, or such con- "firmation is only the recognition of a pre-existing right "or claim, and before the survey and location the Govern- "ment sells a part of the land not necessarily embraced "within the tract confirmed, the title of the purchaser will "prevail." It is further said in the same case: "Up to "that date" (meaning the survey of Bouligny's concession in 1844) "the Government could sell and convey a legal "title to General Lafayette, regardless of the fact that "Bouligny's concession existed, and might be surveyed on "the land previously granted." (10 How., 475; see also Menard's Heirs *v.* Massey, 8 How., 301; Lafebore *v.* Carmeau, 11 Lou., 203; Slack *v.* Drillon, 11 Lou., 587; Lott *v.* Prudhomme, 3 Rob. Lou., 293; Metoyer *v.* Larcnandere, 6 Rob. Lou., 139; Cousin *v.* Blanc, 19 How., 209; McCabe *v.* Worthington, 16 How., 96.

The term "*third persons*," as thus used, (that is, in the 15th sec. act of Congress of 3 March, 1851) "does not "embrace all persons other than the United States and the "claimants, but only those who hold superior titles, such "as will enable them to resist successfully any action of "the Government in disposing of the property." Such is the language of the Supreme Court of the United States in Beard *v.* Federy, thus following the California decisions. (See Waterman *v.* Smith, 13 Cal., 373; Moore *v.* Wilkinson, 13 H., 484; Minturn *v.* Brown, 24 Cal., 644; Arguillo *v.* Greer, 26 Cal., 616; Leese *v.* Clark, 20 Cal., 425.)

The patent relates back to the presentation of the claim for confirmation to the land commissioners. The claim of the Fernandez brothers was presented first, and

by this relation back it is the earlier and superior title. (Waterman *v.* Smith, 13 Cal., 373; Teschmacher *v.* Thompson, 18 Cal., 26; Moore *v.* Wilkinson, 13 Cal., 485; Stark *v.* Barrett, 15 Cal., 385; Ely *v.* Frisbie, 17 Cal., 250.) The Supreme Court of the United States, in the late case of Beard *v.* Federy, opinion by Field, J., say: "The patent "is a deed of the United States. As a deed, its operation "is that of a quit-claim, or rather of a conveyance of such "interest as the United States possessed in the land, and it "takes effect by relation to the time when proceedings "were instituted by the filing of the petition before the "board of land commissioners." (Lander *v.* Brant, 10 How., 373.)

From the foregoing principles, which are sustained by the decisions of the Supreme Court of California, we deduce the conclusion that the elder patent is the superior title. Both grants were imperfect. The maps or diseños show that there is land enough for the location of both grants. The United States having located the Fernandez, it is conclusive upon the defendants claiming under that grant, and must be equally conclusive upon the plaintiffs claiming under the imperfect grant made to Flugge. Under these circumstances the elder title should prevail.

It was held, under the land laws of Virginia, that if a party comes into equity before a patent issues, both parties claiming equitable rights only, (as would be the case here were there no patents, or if we go behind the patents to settle and adjust the interfering rights,) the prior equity will prevail; but if the opposing claimant postpones coming into equity until after the patent is issued, the requisition of the legal title, if *bona fide*, will give to the equity later in point of time the advantage, by having the law on its side; and the equities being equal, the law will prevail. (See McClung *v.* Hughes, 5 Rand., 492. See Story's Eq. Juris., 64 c.)

The Virginia land laws, as they stood prior to the revisal of 1819, allowed a *caveat* to a party objecting to the issuance of a patent; and it was held by the Supreme Court

of Virginia, that if a party failed to avail himself of the remedy by *caveat*, a court of equity could not be called upon afterwards for its aid to set a patent aside, unless he could show that he was prevented by *actual fraud* or accident from prosecuting a *caveat*, or that the grounds upon which he claims relief could not have been used by him on the trial of the *caveat*. At the revisal of 1819 the law was amended, so as to authorize the same relief in equity as if no remedy by *caveat* had been provided. Under this last state of the law the ruling of the court was made in the case cited from 5 Rand.—McClurg *v.* Hughes. So it may be argued here that the 13th section of the act of Congress of 3d March, 1851, gave a remedy by injunction, which the party was allowed to use; and his neglect to avail himself of that would postpone his equity to the legal title of the patentee, whose equity is equal, although prior in point of time. (See United States *v.* White, 23 How., 253, 254.) The equities are equal, because there was more than land enough for both grants embodied in the diseño; and the Government had the right to locate the *specific land* granted against the will of the grantee. This right was reserved in each grant. (See the conditions of the grants.) The fixed legal title must prevail in this action, it being an action at law. (See Arguillo *v.* Edinger, 10 Cal., 150; Davis *v.* Davis, 26 Cal., pp. 38, 39, and cases there cited.) A court of common law will not look beyond the patent into the equities of the parties. (Blunt *v.* Smith, 7 Wheat., 248; McArthur *v.* Browder, 4 Wheat., 488; McLean *v.* Tomlinson, 5 Mumford, 220.) Here the defendant in error relies on his prior equity to a patent, by virtue of his having the elder grant. This is an equity which he can enforce in no other way than by appealing to the equity powers of the court, and this he must do by proper pleadings, so as to inform the plaintiff in error what he is seeking to acquire. (See Davis *v.* Davis, above cited.) The first patent must conclude all parties here. It concludes *parties* and *privies*. The parties are the patentees —the brothers Fernandez, Beeden and Basham on the one side, and the United States on the other. The patent con-

cludes these. The parties claiming under the Flugge grant are in privity with the United States, from the very nature of the grants. Though claiming under the older grant, yet the government did not bind itself to make no other grant within the limits of the diseño of Flugge. "As between "the individual claimants from the government, the title "of the party who had obtained a grant for the *specific land* would be the superior and better one." (17 H., p. 558.) Here the patent to Fernandez *et al.* gave them the first grant for the *specific land*, and that title must be the superior and better one, both at *law and in equity*, for the reason given in Frémont's case. "For by the general grant to Alvarado, "the government did not bind itself to make no other grant "within the territory described until after he had made his survey." (17 H., 558.) The principle embodied in this last sentence is, and must be, of equal force, whether in a court of law or in a court of equity. This principle is a fair deduction from the imperfect character of the original grants. "The interest which each party (grantee) may have had to "a given quantity of land, within a tract larger in extent "than the quantity granted, of necessity, from the imper- "fect nature of the grant, *subsisted in privity* with the title "held by the United States; and the principle by the force "of which the United States would be barred by its con- "firmation, survey, and patent, would bar the *privy*, whose "title, whether present or future, must depend on that of "the United States."

The patent being conclusive upon the United States and all in privity with it, the United States had no right to affect the rights of the Fernandez parties under the act 14 June, 1860, in relation to surveys. The Government having issued the patent previously, could not affect them by any subsequent action. This is acknowledged in the reservation in the patent to Larkin.

IX.

Statute of Limitations.

The act defining the time for commencing civil actions, passed April 22, 1850, provides that a party should have the full time fixed by the act, when right of action had already accured. Sec. 6 provides that no action shall be maintained for the recovery of real property, or for the recovery of the possession thereof, unless the plaintiff, his ancestor, predecessor, or grantor was seized or possessed of the premises in question within five years before the commencement of such action. Sec. 7 provides: "That no "cause of action, or defence to an action, founded upon "title to real property, or to rents and profits of the same, "shall be effectual, unless it appear that the person pros- "ecuting the action or making the defence, or under whose "title the prosecution or the defence is made, or the an- "cestor, predecessor, or grantor of such person, was seized "or possessed of the premises in question within five years "before the commencement of the act in respect to which "such action is prosecuted or defence made." On the 11th of April, 1855, the 7th section of the act of 1850 was amended by the addition of the words, "or unless it appear "that the title to such premises was derived from the Span- "ish or Mexican governments, or that the same was finally "*confirmed by the Government of the United States, or its au-* "*thorities*, within five years before the commencement of "such action." This act, as amended, remained the law upon this subject until the amendment of the 18th of April, 1863, which defined and declared a *final confirmation* to mean "the issuance of a patent from the United States;" or final determination of official survey under the act of Congress of June 14, 1860. And it declared further, "that "the time already run under former act shall be com- "pleted." Without this last-mentioned provision a party plaintiff would have five years from the issuance of his patent from the United States. But this clause requires the time run, under the act of 1855, to be counted. Thus,

for example, if four years had elapsed since the final confirmation of the title by the United States under the act of 1855, the act of 1863 would not commence running for the fifth year against a party claiming under a Spanish or Mexican grant until the patent issued. And that might not issue for several years. Then, whenever it did issue, the four years that had elapsed under the former act should be counted and added to the one year after the patent issued. This seems to be the clear intention and meaning of the act of 1863. And this construction is in harmony with ancient and modern legislation and the ruling of courts of justice on the subject. A different interpretation would not be just or reasonable.

Code Napoleon, Répétitions Ecrits, par Mourlan, 3d vol., p. 792, arts. Code, 2243, &c., Paris, 1863.

Statutes of limitation, as they are called by the common, or the law of prescription, as named by the civil law, are the foundation of all titles. The first and original title to all property, whether held by a State or a person, was simply possession. This may have been obtained by force, fraud, discovery, settlement, or otherwise. And this possession, whenever or however acquired, became, after the lapse of time, a good and perfect title. The wars and quarrels of mankind have, most of them, grown out of disputed questions of this kind. The codes of international law propose some definition of the rights of nations on this subject; and the written and unwritten laws of all civilized people have defined or established some rule of action governing disputed claims by right of prior or long possession to real and personal property. These regulate, between persons, the mode and manner of acquiring a right and title to property by possession, as also the mode and manner of losing the same. A right and title to real property, by the law of California, is acquired by an adverse possession of five years. This is the rule established by the act of 1850, without any exception, to claims under Mexican or Spanish grants. The only exceptions to this early and first rule

were such as related to the incapacity of the person, by insanity, minority, or otherwise.

I. The first question now proposed in this case is, whether or not the plaintiffs in error have acquired title by the statute of limitations. For then it seems a plain proposition, and one easily solved by reference to the facts and the application of the law. These are, that they have been, as shown by the evidence, in the actual, open, adverse, and continuous possession, by themselves and predecessors and grantors, of the tract claimed by defendant in error since the year 1851. That since 1852 and 1855 they have held possession under a Mexican grant. That this grant was confirmed by the land commissioners in July, 1855, upon a petition presented to the board on 19th March, 1852. That the United States dismissed the appeal from this decision of confirmation in March, 1857. *That in May*, 1857, a final survey was made by the United States surveyor general for California, and that finally a patent was issued by the United States for the land confirmed by the commissioners on the 14th of October, 1857; and that this patent was recorded shortly after in Butte county, where the land is located, in accordance with the statute of California. Under the statutes of limitations of 1850 and 1855, the plaintiffs in error acquired title by their possession in the year 1856. Under the act of 11th April, 1855, alone, however, without counting the time which had already passed under the act of 1850, their title was complete and perfect on and after the 11th of April, 1860. From this time this law was their title against all the world, upon satisfactory proof of possession. And upon this they might rest with security. They then acquired a right of property which no subsequent act of legislation could divest or take away without just compensation previously made. (Const. of Cal., Art. I, sec. 1; Billings *v.* Hall, 7 Cal., 1.)

Plaintiff in error might, then, with confidence, rest upon their possession of five years, and claim that the statute of limitations commenced running in their favor on the day of the final confirmation of their claim by the final dismissal

of the appeal on the 9th March, 1857. On the 9th of March, 1862, the law completed their title and made it perfect for them, for then they had been in possession under title for five years after their claim had been finally confirmed by the United States. On the 29th of May, 1862, however, they had been in possession under a final confirmation and a *final survey* for five years. The last and final act of the Government of the United States, in relation to their claim, was the issuance to them of a patent in October, 1857. The five years from the date of final survey confers title absolute, and also bars the remedy of defendant in error and extinguishes his paper title.

Cannon *v.* Stockman, 36 Cal., 535.
Arrington *v.* Liscom, 34 Cal., 366.
Civil Code La., arts. 3420, 3437, 3442, 3447, 3448.
1st Pothier on Obligations, 403.

This survey of the claim of plaintiffs in error, finally approved on the 29th of May, 1857, by the United States surveyor general for California, was "the judgment of the ap- "propriate department of the Government of the United "States, and is conclusive upon the courts, in actions of eject- "ment, as the adjudication of a competent tribunal, upon a "subject within its exclusive jurisdiction. And its determi- "nation or judgment is not the subject of review by the ju- "diciary." (Moore *et al. v.* Wilkinson *et al.*, 13 Cal., 478.) The case last cited involved the rights of the plaintiffs in error in the present suit under their finally-confirmed grant and survey. This is one of the leading cases in California, in which the law governing the rights of claimants under Spanish and Mexican grants is justly, fully, and ably expounded. And the rulings and views therein have been substantially adopted by the United States Supreme Court, in later cases (United States *v.* Sepulveda, 1 Wall., 104) overruling its former decisions in the case of United States *v.* Fossatt, 21 How., 445, and Castro *v.* Hendricks, 23 How., 438.

The supreme court of California have decided (overrul-

ing Johnson *v.* Van Dyke, 20 Cal., 255,) that a final survey of a grant completes title without issuance of patent. The statute of limitations commenced running, then, from the time of the *final approval of the survey*, and not from the time of the issuance of the patent. (Mahoney *v.* Van Winkle, 33 Cal., 448,) In the case of Cannon *v.* Stockman, 36 Cal., 535, before cited, the court held that the five years, time which confers title absolute may not be next preceding, but at any previous time. The title once acquired by the prescription of five years is perfect, though it may have been by a five years' possession long preceding the commencement of an action by a party plaintiff. And this is, or should be, the law everywhere. The Legislature of California, in adopting the law prescribing the mode of acquiring and losing various kinds of property by lapse of time, fixed short terms. These rules were then both wise and necessary, considering the mixed character of its inhabitants, the vast extent and peculiar condition of its unoccupied and vacant lands, as also the roving and unsettled habits of a large portion of the people who were engaged in mining operations. For the purpose of encouraging the permanent settlement of its people and the establishment of homes and family ties, a possession for a short period of time was all that was necessary to acquire title. In the Old World the period of from twenty to thirty years was necessary to acquire title by possession. But in this new State her law-givers generously and wisely offered better terms to permanent settlers than were ever before offered in any other country. The settler from any part of the world received a solemn constitutional guarantee that his title to real or other property in that State, if he settled in good faith, should have the same protection, whether a naturalized citizen or not, as a native-born citizen; and that it should descend and be distributed by will or by the law to his heirs, wherever they might reside. (Const. of Cal., art 1, sec. 17.) Such, briefly, are the rules of law and the reasons for the same, which establish that the plaintiffs in error in this case have a perfect title in virtue of their ad-

verse possession, in good faith, with title of five years from 1852, or from the 29th of May, 1857, when their confirmed claim was finally surveyed and segregated from the public lands of the United States, or from the 14th October, 1857, when their patent issued.

The defendant in error's predecessors had, in addition to rights of actions in the State courts, a right of action given them in the United States courts by the 13th section of the act of Congress of 3d March, 1851, to restrain the issuance of a patent to Fernandez. This right accrued on, if not before, the approval of their final survey of the 29th May, 1857. Between this last date and the date of the issuance of the patent to the Fernandez, the 14th October, 1857, there was ample time to make application to the United States district courts to restrain the Commissioner of the General Land Office from issuing a patent. And if defendant's predecessors had any right or title to any of the land finally surveyed to the predecessors of plaintiffs in error, it were reasonable to presume that they would have availed themselves of this right of action. By so doing, they would have shown a desire to arrest the running of the statute of limitations of 1855, which gave to the possessors holding five years adversely under United States patents a perfect title, or what has always heretofore been held a perfect title.

II. Having shown, as we believe, that plaintiffs in error have acquired a perfect and complete title by possession and the lapse of time, the next and second question is, has the defendant in error, if he ever had a right of action against plaintiffs, founded upon a title, lost the same by operation of the statutes of limitation? The facts are, that *in the year* 1844 a grant was made by the governor of California to one Flugge of "five leagues of land on the west-"erly side of Feather river, and stretching along said river "from 39° 33′ 45″ to 39° 48′ 45″ north latitude." That this grant was in the usual form, with certain onerous conditions subsequent. 1. That he should teach the Indians, and not disturb their fisheries. 2. That he should occupy it within

a year. 3. That he should get juridical possession and have boundaries marked. That the map accompanying the petition to the governor represented the tract of land petitioned for as lying on the west bank of Feather river, bounded on the south by a line marked latitude north 39° 48′ 45″, with Arroyo de Honcut on the opposite or east side of the river, and three or four Indian rancherias. That the grant was confirmed by departmental assembly of California. That Flugge never received juridical possession of the land granted, and never settled permanently upon it. That in 1847, after the acquisition of California by the United States, Thomas O. Larkin purchased by private act Flugge's title. That his conveyance from Flugge describes the land as "commencing on Feather river, near latitude "39° 33′ 45″, thence running back westerly one league; "thence northerly five leagues, parallel with Feather river; "thence down said river to place of beginning." That on *the 24th of March*, 1852, Larkin filed his petition before land commissioners, claiming the land granted to Flugge. That on 1st May, 1852, the commissioners ordered a preliminary survey to be made of this claim pending before them by the United States surveyor general for California. That under this order the United States Surveyor General S. D. King issued instructions on 21st May, 1852, to a deputy (Nicholas Gray) to make the survey so ordered by commissioners. *That on 8th December*, 1852, a duly certified copy of this survey, with the plat and field-notes, approved by said United States surveyor general, was sent by him to the land commissioners, and was filed with the papers in the case. That *on the 17th of July*, 1855, *the commissioners* CONFIRMED the claim to the plan called "Boga, "of five square leagues, to be located according to the calls "in the grant, and the boundaries, as determined on the "map accompanying the expediente. The southern bound-"ary line is indicated on the said map by the line marked "39° 48′ 45″ north latitude, being on the west side of "Feather river, and to be of sufficient width to contain five square leagues."

On the 24th of December, 1856, the appeal was dismissed by the Attorney General.

On the 9th of February, 1857, a stipulation to dismiss the appeal by United States was signed by the United States attorney and the attorney for claimant, consenting to dismissal of appeal. On the same day the *district court of the United States for the northern district of California ordered that the appeal be dismissed*, and that the claimant have leave to proceed as under a final decree. *On the 10th of February*, 1857, a certified copy of this order of district court was filed in office of the United States Surveyor General for California for a survey. Afterwards questions arose about the true locations of the land, finally confirmed to Larkin. The act of Congress of March 3d, 1851, vested the whole subject of the location of all finally confirmed California land claims in the United States surveyor general for California. The land commissioners and the judiciary had finished their labors and exhausted their special jurisdiction over this case. It passed then from the district court into the hands of an executive officer specially vested with exclusive jurisdiction over the whole subject of the location of the land finally confirmed. This officer was made by the law the only and sole judge and interpreter of the meaning of the final decree of confirmation, a copy of which had been lodged with him. By the act of Congress there was no appeal from the decision of the United States surveyor general of California.

Section 13 of this act, before cited, says: "Upon all "claims finally confirmed, a patent SHALL issue to the "claimant, upon his presenting to the general land office "an authentic certificate of such confirmation, and a plot "or survey of the land, duly certified and approved by "the surveyor general of California, whose duty it shall "be to cause all private claims which shall be finally con-"firmed to be accurately surveyed, and to furnish plots of "the same. And in the location of the same he shall have "the same power and authority as are conferred on the "register of the land office and receiver of public moneys

"of Louisiana, by the sixth section of the act to create the "office of surveyor of the public lands for the State of "Louisiana, approved March 3d, 1831." Brightly Dig., 46, p. 113. The sixth section of the act of 1851, referred to, provides, that "where there is any conflict between "claimants, the register and receiver are authorized to de- "cide between the parties; and if they do not agree to condi- "tional lines, verbally or in writing, then to decide in such "a manner as may be consistent with the principles of "justice. And the surveyor general shall have such "claims surveyed and patented in accordance with the "decisions of the register and receiver; provided that "such decision, survey, and patents which may issue in "conformity thereto, shall not be considered as precluding "a legal investigation and decision by the proper judicial "tribunals between the parties to such interfering claims; "but shall only operate as a relinquishment on the part of "the United States of all title to the land in question." 4 United States Statutes at Large, 494.

The said 13th section of the act of 3d of March, 1851, provides further: "That if the title of the claimant to such land "shall be contested by any other person, it shall any may "be lawful for such person to present a petition to the dis- "trict judge of the United States for the district in which "the lands are situated, plainly and distinctly setting forth "his title thereto, and praying the said judge to hear and "determine the same; a copy of which petition shall be "served upon the adverse party thirty days before the time "appointed for the hearing of the same: *And provided fur- "ther*, That it shall and may be lawful for the district judge "of the United States, upon hearing such petition, to grant "an injunction to restrain the party at whose instance the "claim to said lands has been confirmed from suing out a "patent for the same until the title thereto shall have been "finally decided; a copy of which order shall be trans- "mitted to the Commissioner of the General Land Office, "and thereupon no patent shall issue until such decision "shall be made, or until sufficient time shall, in the opin-

"of said judge, have been allowed for obtaining the same; "and thereafter the injunction shall be dissolved." Section 15 of the same act provides, that a final decree or patent shall be conclusive between the United States and claimants only, and shall not affect third parties.

The surveyor general of California, Mandeville, upon the receipt, as before stated, of the certified copy of the final decree of confirmation of the Larkin claim, "caused "an accurate survey to be made, and furnished a plat of the "same." This survey and plat so made was approved by the surveyor general, Mandeville, on the 26th of March, 1858. This location was made substantially in conformity to the description of the land petitioned for by Flugge and granted by the governor of California, and substantially as surveyed in 1852, under the order of the land commissioners, by S. D. King, then the United States surveyor for California, and in strict conformity to the final decree of the commissioners. With this plat of the survey of the land and an authentic certificate of the final confirmation, the claimant, upon presenting the same to the General Land Office, "shall have a patent issued." So says the act of March 3, 1851. Did the claimant comply with the law, and demand a patent? The evidence of Mandeville shows that he furnished a copy to Larkin, and sent on another to Washington. It is believed he did not. It seems that subsequently this survey was *rejected by the Commissioner* of the General Land Office at Washington, and that it was sent back to the United States surveyor general for California, with instructions to make a new survey. This was ordered June, 1859.

The Commissioner of the General Land Office had no jurisdiction over this class of surveys, and had *no authority to reject* the survey of the surveyor general of California. Here is the first error and departure from the law. And the long, expensive, and injurious litigation to Larkin and to others, innocent third parties, was the result of the neglect of Larkin, and of mistakes made by said executive officers of the United States. If Larkin had applied to

the Land Office for his patent, as he should have done within a reasonable time, and it had been refused him, he could, and should, have sought, without delay, assistance from the courts of justice. Upon a proper application and showing, no court of competent jurisdiction would have refused a mandamus to compel the Commissioner of the General Land Office to issue him a patent. This remedy was open to Larkin, but he did not choose, or neglected, to avail himself of it.

9 Opin. Atty. Gen. U. S., ~~108~~ 109, quoted in vol. 12, case at 255.

12 Opin. Atty. Gen. U. S., 116, Castillero's claim.

12 Opin. Atty. Gen. U. S., 250, (Stanberry Atty. Gen.,) Sept. 30, 1867.

Castro *v.* Hendricks, 23 How., 438; *contra*, *overruled* in United States *v.* Sepulveda, 1 Wall., 104.

We have now reached a point in the history of the case of defendant in error when we may, with great confidence, assert that, on the 26th of March, 1858, his predecessor, Larkin, had a right of action under his *finally-confirmed* title against any person in possession of, or claiming title to, any part of the land so finally confirmed to him by the United States. His right of action accrued when he obtained title from Flugge in 1847. It continued under the new government of California, and was specially extended by the act of the 22d of April, 1850, for five years from that date. And eleven days before this time expired the act of April 11, 1855, came to his assistance, and continued the time to "within five years from the time of the "*final confirmation of his title* by the Government of the "United States or its legally-constituted authorities." His title was *finally confirmed* in fact by the United States on the 24th of December, 1856, when the appeal of the United States was dismissed by the Attorney General of the United States. This was a final acknowledgment by the United States of the title of Larkin, and was properly the end of the litigation. On the 9th of February, 1857, as before

stated, the United States District Attorney and the attorney for Larkin in this case filed a written stipulation, consenting to the dismissal of the appeal. And, on the same day, the United States district court made an order, in pursuance of the dismissal of the appeal by the Attorney General of the United States and the stipulation of the parties plaintiffs and defendant, that the appeal should be dismissed, and that the claimant might proceed upon the decree of the Land Commissioner as upon a final decree. It would appear that this was, or should have been, an end of all further contest or proceedings on the part of the United States respecting the claimants' title. On the 9th of February, 1857, Larkin had a *finally-confirmed title* to five leagues of land on Feather River, within certain large exterior boundaries, which he had long before selected and occupied. He could at that time have asserted his rights in the courts of justice, under his finally-confirmed title, against any and all persons claiming, by title or otherwise, lands embraced within his selected and surveyed boundaries, or within his exterior boundaries described in his grant and map. From this day, then, the statute commenced running against his right of action.

On the 9th of February, 1862, the five years elapsed, and Larkin, and those claiming under him, lost their right of action; and the statute of April 18, 1863, did not, and could not, restore this lost right.

The last proviso of the 6th section of this act of 1863 says: "*Provided further*, That nothing in this act shall be "so construed as to extend or enlarge the time for com- "mencing actions for the recovery of real estate, or the "possession thereof, under title derived from Spanish or "Mexican governments, in a case where final confirmation "had already been had, *other* than is now allowed under "the act to which this act is amendatory."

Section 7 provides, "final confirmation, within the mean- "ing of this act, shall be deemed to be a patent issued by "the Government of the United States, or the *final determi-* "*nation of the official survey*, under the provisions of the act

"of Congress entitled an act to define and regulate the ju-
"risdiction of the District Court of the United States in
"California, in regard to the survey and location of con-
"firmed private land claims, approved June 14, 1860."

But if the right of action of defendant in error did not accrue on the 9th of February, 1857, it certainly, and beyond all question, accrued thereafter, on the *26th of March*, 1858, when the location and survey was approved by surveyor general for California. On that day, with this approved survey, the title of the claimant was complete. Larkin's title to that particular tract vested on that day. And it was as perfect as if a patent had been then issued. The statute of March 3, 1851, vested the title. And after the statute title vested, the only office of a patent was to afford this party more convenient evidence in establishing his right when brought in contest. (Case before cited, 12 Opin., 250.) After that day an action might have been commenced under his previously and finally-confirmed title; and fortified completely by this survey, he could have ejected all persons on his lands having inferior or no titles. On the 26th of March, 1863, the five years from the date of this survey having elapsed, the doors of the courts of justice were forever barred, by the statutes of limitation, against any and all attempts he might make, under his title, to oust the plaintiffs in error, who had been at that time more than five years in the actual, open, adverse, quiet possession, under final survey made in April, 1857, approved by United States surveyor general 29 May, 1857, and a final patent from the United States, dated October 14, 1857. It may be instructive to follow the proceedings in the case of defendant in error after this time, in the surveyor general's office. They show the conflicting opinions of certain executive and judicial officials upon the construction and meaning of so simple a matter as a decree of the land commissioners. The first surveyor general of California, Thomas Davidson King, located the land as he understood the terms of the original grant and the instructions of the board of land commissioners. The commissioners seem to have care-

fully worded their decree, so that this preliminary survey would serve as a guide and basis of the final survey. Mr. King's successor in office, after the final confirmation, ordered a deputy to make a final survey.

This deputy was directed, by carefully-drawn and written instructions, how to proceed in making the survey in the field. He was also furnished with a copy of a circular of general instructions, addressed to the United States surveyor general of California from the Commissioner of the General Land Office, dated November 28th, 1855, containing advice as to the mode and manner that the surveyor general should make surveys of all finally-confirmed land claims. These advisory instructions state that the decree of the commissioners must be strictly adhered to, and exactly observed. That "where the decree fixed a specific "quantity, and the diseño or map referred to in the decree "gives a much larger surface, the location should be made "in a compact form, according to the lines of the public "surveys within that surface, *at the election* of the confirmee, "as to the precise locality, but in such a manner, when-"ever practicable, as not to interfere with any adverse "claim. When this is not practicable, consistently with "the calls of the confirmation, the law is explicit as to the "proceedings for the settlement of the conflict. In any "case of this kind the surveyor general should make a "formal demand upon the confirmee to give in writing a "specific designation of the locality he might elect within "the extended limits indicated by the plot in the record; "and a period should be fixed within which he should be "required to make his election. In default of compliance, "it will be the duty of the surveyor general to *exercise his* "*sound judgment* in fixing the location, having due regard "to the right of the confirmee, and in conformity with the "record." The only change he made in the King survey was altering the back lines so as to conform to the lines of the Government survey of the public lands. This survey, as before stated, after a delay of more than a year, was set *aside by the Commissioner of the General Land Office.*

Where he found his authority, in May, 1859, to interfere in the manner he did, we have not been able to find in the U. S. Statutes. He had authority, and might have directed and controlled the surveyor general of California in all matters relating to the survey of the *public* lands in California, but he had no right to interfere in the surveys of the finally-confirmed *private* land claims. Nor did he pretend to claim any such right in November, 1855. In the circular before quoted, he merely counsels and advises the surveyor general how to act. He therein leaves the matter of location anywhere within the exterior boundaries of the map to the *sound discretion* of the surveyor general, for with this he could not interfere.

The act of Congress of March 3, 1851, entrusted this class of surveys to the sole and exclusive jurisdiction and *discretion* of the surveyor general. In all these cases he was the sole arbitrator and judge between the claimants and the United States; and when he once decided, there was an end of the matter as between the claimant and the United States. If Congress had intended that the surveys of these private land claims, made by their specially-named agent, should undergo any subsequent examination by any other executive officer of the Government, with the power to reject and set aside such survey so made by their agent, and with power to order a new one to be made in a different manner, they would have said so in that act. The land commissioner, however, in 1859, indulged, perhaps, a habit of authority in this case, in ignorance or regardless of his instructions of the 28th of November, 1855, and of the fact that he had no discretion or legal authority in the matter, except to issue the patent whenever the claimant presented to him a certified final decree and a plot approved by the surveyer general of California. The decision of the surveyor general of California in this case, in the matter of the survey made and approved on the 26th March, 1858, was a *final determination* and a *final judgment* of the appropriate department and of the special officer of the Government solely intrusted with the whole matter;

and this final determination and judgment could not be set aside or disturbed by any other executive officer of the Government. Nor could the decision, when once made and accepted by confirmee, and acquiesced in for so long a time by the United States, be reopened, changed, or set aside, even by the surveyor general of California himself. He was made by the act of Congress their special judge, agent, and arbitrator in the matter; and the United States having once made by their special and sole agent a survey, and approved the same, and the claimant having accepted it, it was a finality. Both parties had acted, and both were satisfied with the survey of March 26th, 1858, and thereafter the power of the special agent of Congress was exhausted, and there was no appeal to the Commissioner of Land Office. Any second or subsequent award or decision in the matter was void for want of authority. (Russell on Arbitration, 135; 1 Pothier on Obligations, 478.) In the case of the United States *v.* Sepulveda, 1 Wall., 104, heretofore cited, the court, by Justice Field, held, that previous to the act of Congress of June 14, 1860, the district courts had no jurisdiction of the location and surveys of the titles finally confirmed to claimants under Spanish and Mexican grants in California.

"The duty of the board of land commissioners was dis-"charged by confirmation of the claim in the general "terms of the grant, leaving the specific quantity desig-"nated to be surveyed and laid off by the proper officers "of the Government, to whom the subject of surveys was "intrusted. With the surveys following the decrees of "the board, the district court had nothing to do. The "surveys of confirmed Mexican grants, particularly when "they are for quantities lying within exterior boundaries "embracing larger tracts, involve considerations of various "matters not perfectly the subject of judicial inquiry." It is true that the court said further, that the acts of the surveyor general in these matters was subject to the supervision of the Commissioner of the General Land Office at Washington, who was invested, by the previous legislation

of Congress, with a general supervision over the acts of all subordinate officers charged with making surveys. But the court does not and could not say that the Commissioner had power to set aside the surveys of the Surveyor General, and to direct how and when a new survey should be made.

The Commissioner of the Land Office did, however, in November, 1855, go to the full extent of his general supervisory authority when he drafted his circular. The previous legislation referred to, upon examination, will be found to relate to the survey of the public lands of the United States. In all matters relating to surveys of public lands the Commissioner of the General Land Office had a supervisory control over his subordinates, with power to control their acts. But when Congress vested exclusively the power to survey finally-confirmed private land claims in California in the surveyor general of California, it seems that with his acts, exercised under and withint his special power, the Commissioner of the Land Office had no more control, except advisory, perhaps, than he would have had over any other inferior and subordinate officer of the Government in other departments.

The power specially delegated to the surveyor general of California may be compared to a like power given by an owner of the legal title to a special agent, with discretionary power to select, locate, and survey a certain quantity of land out of a larger tract, to a party having the equitable title. And when the agent has once acted, and made the selection, and his act been accepted by the other party, he has exhausted his power. And when the act of the agent is accepted by the owner of the equitable title, and is followed by an entry and occupation of the land so set apart from the adjoining lands of the owner of the legal title, the act of the agent within the scope of his discretionary authority, would be conclusive and binding upon the principal, and he would not be permitted to disturb or deny the act or the authority of his agent. He would be irrevocably bound by it. Nor could the agent thereafter review, amend,

alter, and set aside his act. Certainly not after its acceptance by the party benefited. And even if the holder of the equitable title consented to reopen the matter, the agent could not act again without a new power from his principal. The great injustice done by reopening final surveys to the claimants under Mexican grants and numerous innocent persons, who were induced to purchase lands so surveyed, segregated, and set apart, and to the settlers upon the adjacent public lands so adjudged by such marking of the boundaries by the surveyor general of the private land claims, will be hereafter briefly discussed. The predecessor of the present defendant in error, Larkin, before or immediately after his preliminary survey in 1852, entered into the actual possession of the land so surveyed. J. C. Mandeville, made and approved the survey on the *26th March*, 1858, in accordance with his construction of the final decree of the land commissioners and the wishes of the claimant.

And here the matter rested for more than a year.

Larkin died in October, 1858, in the belief that his land litigation and troubles with the United States were at an end. Upon his death, his vested legal title under said final survey of 26th March, 1858, (seven months before his death) passed to his heirs. And these vested rights could not be taken away from these heirs except by due course of law.

On the 4th of October, 1859, in obedience to instructions from the Commissioner of the General Land Office, the surveyor general, Mandeville, made and approved a second survey, locating the Larkin claim (five leagues) on the west bank of Feather river, bounded on the north by the southern line of the Fernandez grant, and on the south by the northern line of the Sutter grant, on the tract of five leagues, south of the Fernandez survey, left vacant by Hays. And when the news of this new survey was received by the settlers on the land, it stirred up a small army of opponents, who had been induced by the notoriety of the preliminary survey in 1852, and the approved survey of the 26th of March, 1858, and the occupation

and settlement by Larkin and others under him of the tract so located, and the repeated disclaiming by Larkin to any other lands outside this location, to settle and improve the large tract of five leagues of public land lying between the established southern line of the Fernandez and the northern line of the Sutter grants.

Perhaps this second survey would never have risen to disturb the peace of these numerous settlers had Larkin lived. They had been influenced by Larkin's location of his grant and his occupation and disclaimers, and acted in good faith to all parties. They were therefore justly alarmed at the prospect of losing their homes.

At Larkin's death he left the Boga ranch to his heirs, and they left the case of this new litigation to attorneys and agents. About a year after this survey the *the Commissioner of the General Land Office at Washington claimed* to have a right to set aside and reject it, under the authority, perhaps, of Castro *v.* Hendricks, (23 How., 438,) and to have the further authority to interpret the land commissioner's decree of confirmation, and to control a second survey which he ordered the surveyor general of California to make. The surveyor general of California wrongfully yielded his exclusive discretionary power to the dictation of the Commissioner of the General Land Office, and the wrong and injury to settlers before stated was thus perpetrated by this second location and survey of the Boga grant. No evidence has been found that the heirs of Larkin refused to receive this second location. On the contrary, it appears by the subsequent proceedings in the United States district court that they accepted, or were willing to accept, this second location and survey, and subsequently resisted the persistent efforts of the settlers to move up this location. These settlers had good reason to complain, not only of the action of Larkin and his representatives by their selection and disclaimer of lands lying several leagues to the north, but of the agents of the government, who, by their errors, had induced them to settle upon lands marked upon the public maps and surveys as public lands of the

United States. They hurried down to San Francisco and sought counsel and relief. They found partial relief, but not all they asked or expected. Thereupon, at their instance, proceedings were commenced on the 19th of December, 1859, in the United States district court, by the acting United States District Attorney, Tully R. Wise, by the filing of a petition, suggesting that the survey in the case of Thomas O. Larkin *v.* United States, made and approved on the 4th of October, 1859, was erroneous, and praying for an order that the United States surveyor general for California should return into court a certified copy of the plat of the same. Such an order was made, and a copy of it served on the United States Surveyor General. The order was obeyed by the surveyor general.

Thereafter, on the 22d of December, 1859, the United States district attorney filed exceptions to this survey. Thereafter, on the 27th of August, 1860, a monition was ordered to be issued by the district court, directed to the United States marshal, and reciting that, "Whereas objection had been made to the "official survey and location of the land finally confirmed, "in case No. 358, to Thomas O. Larkin, known as Flugge's "Rancho, or Boga, in the county of Butte, you are com- "manded, in the name of the President of the United States, "to give due notice to all parties having a claim or interest "in said survey and location, that they appear before the "district court on the 3d of October, 1860, at 11 a. m.," &c. On the 3d of October, 1860, the marshal made return that "he had received the monition on the 27th of August, "1860, and that in obedience thereunto, he had given the "notice for four consecutive Wednesdays in the San Fran- "cisco Herald, commencing on the 29th of August, 1860, "and for four consecutive Saturdays in the Butte Demo- "crat, a paper published nearest the land, commencing on "the 1st of September, 1862." On the same day the United States attorney, and John B. Williams, representing the settlers, appeared for the United States, and claimant appeared by attorneys. Default was then ordered to be entered as to all parties not appearing. On the 16th of

March, 1861, after certain proceedings, the district court rejected the survey made under special instructions from the Commissioner of the General Land Office, and ordered a new one to be made in accordance with its opinion. On the *4th of December*, 1861, the United States attorney filed a petition. The cause was reopened on the 15th of November, 1862. The district court ordered that the official survey shown by the plot filed *December 7th*, 1859, *be set aside as erroneous*. That the location be corrected and reformed as follows:

"The southern line to be run, as indicated in the diseño "in the expediente marked F. S. D. K., and authenticated "by the rubric of Micheltoreno, by the natural objects therein "represented; and thence northerly along the Feather river, "five leagues. The width to be one league, making five "square leagues, and no more." On the 15th of January, 1863, the plot having been previously altered, as decree directed, but without a new survey, and returned into court, it was approved by the judge. From this order an appeal was taken to the Supreme Court. *On the 26th of June*, 1865, on mandate from Supreme Court, the district court ordered that the plot herein filed, on *the 12th of January*, 1863, *do stand finally confirmed*. By this proceeding in the district court, making a new decree, and altering materially the last survey, the lands covered by the Fernandez patent were invaded on the south to the extent of about one league. *On the 5th of October*, 1865, the patent was issued upon the *third* and, so far, last survey. Without discussing the legality of these extraordinary proceedings, any further, in the United States District Court, and their effect upon the previously-vested rights of the claimant to another tract of land, or the equitable claims of the settlers, we will add another word as to whether they affected these plaintiffs in error.

Had these proceedings been regular, and had the survey of the 26th of March, 1858, or that of October 4, 1859, conflicted in any way with their patent or possessions under it, perhaps they might have been affected. But they were

not interested in any way. The last survey, which we may presume was the one called into court, though not specified by the notice, did not cover a foot of their land, and they could have had no reason or interest in appearing to contest either the first or second survey. It was a matter which interested only the then claimant and the settlers, and perhaps the United States. But when the district court, at the instance of the settlers, undertook to change the decree of the land commissioners, and to make a new and entirely different location and survey, not thought of by any of the three learned surveyor generals or the Commissioner of the General Land Office, who were supposed to be capable of forming a sound judgment upon questions of this kind, and who had actually made three locations and surveys, it ventured to determine a question not judicial and already settled, and exceeded its jurisdiction.

The court, perhaps, was of the opinion that the settlers had been badly treated by Larkin and the United States; and the grant must therefore be shoved upon lands that Larkin and his heirs had never before claimed or thought of claiming, and which the United States had long since patented to third parties, who were not in court, and had no actual or constructive notice of these proceedings other than a published monition not addressed to them, and not known to him. The district court had no jurisdiction of any of these plaintiffs in error nor any of their lands; and its whole action in the matter, as to them and their property, not being present or lawfully cited, was simply void, as we have argued in the forepart of this brief.

We respectfully submit that the errors thus pointed out are sufficient to set aside the judgment below and authorize a judgment to be entered for plaintiffs in error.

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Attorneys for Plaintiffs in Error.

NOTE.—It is proper for us to say that we are indebted to the counsel of plaintiffs in error, who managed the case in the circuit court, for valuable aid in the preparation of this brief.

IN THE

Supreme Court of the United States.

No. 131.—October Term, 1873.

J. M. Henshaw and Others, Plaintiffs in Error, vs. George R. Bissell. } Error to the Circuit Court of the United States for the District of California.

Brief of Counsel for the Defendant in Error.

This controversy grows out of a conflict between the United States surveys of the Boga rancho and the Fernandez rancho. Bissell, the defendant in error, holding an undivided interest in the Boga rancho, sued the plaintiffs in error, holding under the Fernandez title, for a league of land situated in the north part of the Boga survey, and recovered judgment, and the plaintiff in error brought the case to this court by writ of error.

The case was tried by the court—a jury being waived by stipulation in writing—and the findings of fact by the court are at page 13 of the record, and its rulings upon the law, twelve in number, are at page 24.

There are, however, but two questions in the case: 1st, whether the Statute of Limitations applies; and, 2d, whether the plaintiffs in error were bound by the decree of the district court locating the Boga grant. The case of Gibson vs. Chouteau, 13 Wall., p. 92, fully sustains

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the court on the first question, and we cite the language of the act of 14th June, 1860, 12 Statutes, p. 33, in support of its decision on the second question. The second section of that act authorizes the court "to make an order requiring any survey of a private land claim * to be returned into the district court for examination and adjudication," and makes it "the duty of the surveyor general to transmit said survey and plat forthwith to said court;" and, by the second proviso of the third section, page 34, requires "that before proceeding to take the testimony or to determine on the validity of any objection so made to the survey and location as aforesaid, the said courts shall cause notice to be given by public advertisement, or in some other form to be prescribed by their rules, *to all parties in interest*, that objection has been made to such survey and location, *and admonishing all parties in interest to intervene for the protection of such interest.*" The fourth section provides that "on hearing the allegations and proofs the court shall render judgment thereon; and if, in its opinion, the location and survey are erroneous, it is hereby authorized to set aside and annul the same, or correct and modify it; and it is hereby made the duty of the surveyor general, on being served with a certified copy of the decree of said court, forthwith to cause a new survey and location to be made, or to correct and reform the survey already made, so as to conform to the decree of the district court, to which it shall be returned for confirmation and approval."

That this judicial proceeding to settle the location of a grant applied to and included those who were interested in the location by holding adverse claims which would be affected by it, as well as to those interested in the grant to be located, appears expressly by the provision in the third section of the act, which declares that "all parties claiming interest (in such location) under pre-emption, settlement, *or other right or title derived from the United States*, shall not be permitted to intervene

separately, but the rights and interests of said parties shall be represented by the district attorney of the United States, aided by counsel acting for said parties personally, if they shall think proper to employ such counsel." This language applies in terms to the plaintiffs in error. *They claim title by patent from the United States.* They had the notice which the law prescribed "to intervene for the protection of their interest," and the case stands as if they had actually appeared by counsel and contested the survey before the ~~writ~~ court. The question of location was, therefore, properly held by the circuit court to be *res judicata*.

M. BLAIR.
F. A. DICK.

NOVEMBER, 1873.

6 Wheaton 125.
4 Peters 472
1 " 340
9 Wheaton 246
11 Wallace 267
8 Howard
Merrick Hay v
Mattingly